Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

EMANUEL OBAJULUWA,

Petitioner,

v.

JANET RENO, Attorney General, United States of America; IMMIGRATION AND NATURALIZATION SERVICE; ARTHUR E. STRAPP, District Director,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") repealed the jurisdiction of the federal courts under 28 U.S.C. § 2241 to consider on a petition for a writ of habeas corpus constitutional and statutory claims asserted by aliens convicted of crimes specified in the Immigration and Nationality Act ("INA").

2. Whether any such repeal of habeas corpus jurisdiction under 28 U.S.C. § 2241 violates Article I, § 9, cl. 2 (the "Suspension Clause") or Article III of the United States Constitution, or the Due Process Clause of the Fifth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

All parties below are named in the caption.

Petitioner Emanuel Obajuluwa was the petitioner/appellant below.

Respondents Janet Reno, Immigration and Naturalization Service, and Arthur E. Strapp were the respondents/appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Emanuel Obajuluwa respectfully petitions this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-5a) is not reported. The judgment and order of the district court (*id.* at 6a-7a) are not reported. The Findings and Recommendations of the United States Magistrate Judge (*id.* at 8a-12a) are not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 7, 2000. Mr. Obajuluwa did not seek rehearing. This petition is being timely filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, § 9, cl. 2 of the United States Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

2. The Due Process Clause of the Fifth Amendment provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"

3. Article III of the United States Constitution provides, in pertinent part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority[.]"

4. INA § 242(a)(2)(C), added to the Immigration and Nationality Act by IIRIRA and codified at 8 U.S.C. § 1252(a)(2)(C), provides, in pertinent part:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section [1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D)], or any offense covered by section [1227(a)(2)(A)(ii)] for which both predicate offenses are, without regard to their date of commission, otherwise covered by section [1227(a)(2)(A)(i)].

5. INA § 242(b)(9), added to the Immigration and Nationality Act by IIRIRA and codified at 8 U.S.C. § 1252(b)(9), provides, in pertinent part:

> Judicial review of all questions of law and fact, including interpretation and application of constitu-

tional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section.

6. 28 U.S.C. § 2241 provides, in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .

* * *

(c) The writ of habeas corpus shall not extend to a prisoner unless –

* * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

STATEMENT OF THE CASE

Petitioner Emanuel Obajuluwa ("Mr. Obajuluwa") is a Nigerian citizen who has lived in the United States for almost 20 years, and as a lawful permanent resident since 1990. On August 18, 1994, Mr. Obajuluwa pled guilty to credit card fraud and conspiracy to commit wire fraud, money laundering, and credit card fraud, and was sentenced to 56 months in prison. At the time he entered his 1994 guilty plea, Mr. Obajuluwa was eligible to seek relief from deportation under INA § 212(c) (8 U.S.C. § 1182(c)), which permits the Attorney General to grant relief from deportation for humanitarian reasons.

On April 24, 1996, however, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") (Pub. L. No. 104-132, 110 Stat. 1214), which, at § 440(d), eliminated the ability of so-called "aggravated fel-

ons" to obtain discretionary relief under INA § 212(c). On September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") (Pub. L. No. 104-208, 110 Stat. 3009), which, among other things, repealed INA § 212(c) altogether, replacing it with a new, similar section, INA § 240A (8 U.S.C. § 1229b). As with INA § 212(c) after AEDPA, INA § 240A bars the granting of discretionary "cancellation" of removal for aggravated felons.

On April 22, 1997, almost three years after Mr. Obajuluwa's 1994 guilty plea, the Immigration and Naturalization Service ("INS") commenced removal proceedings against Mr. Obajuluwa. *See* R. 46.[1] On September 28, 1998, the Board of Immigration Appeals ("BIA") affirmed an immigration judge's previous determination that Mr. Obajuluwa was subject to removal, and further denied Mr. Obajuluwa's request for relief under INA § 212(c), finding that such relief had been "repealed and replaced by [INA § 240A]," and that Mr. Obajuluwa was not eligible for "cancellation of removal" under INA § 240A, because he had been convicted of "aggravated felonies." *See* R. 47-48. The BIA also declined to address Mr. Obajuluwa's objections to the constitutionality of the INS's applying INA § 240A's bar on relief for "aggravated felons" retroactively by using Mr. Obajuluwa's 1994 guilty plea to disqualify him from any such relief. *Id.* The BIA denied reconsideration on November 25, 1998. *See* R. 50-51.

A. Proceedings In The District Court

On February 9, 1999, Mr. Obajuluwa filed a Petition for a Writ of Habeas Corpus (the "Petition") in the United States

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[1] Cites to "R." refer to the record on appeal.

District Court for the Northern District of Texas.[2] In the Petition, Mr. Obajuluwa challenges the legality of the BIA's removal order, asserting that its retroactive application of the 1996 IIRIRA provisions to his 1994 guilty plea was contrary to the INA, and violated the Due Process Clause of the Fifth Amendment and the *Ex Post Facto* Clause of the United States Constitution (U.S. CONST., art. I, § 9, cl. 3). R. 1-51. The jurisdictional bases for the Petition are 28 U.S.C. § 2241 and Article I, § 9, cl. 2 of the United States Constitution (the Suspension Clause). *Id.*

On April 27, 1999, the United States Magistrate Judge issued his Findings and Recommendations, dismissing Mr. Obajuluwa's Petition for lack of subject matter jurisdiction. *See* App. 3a. The Magistrate Judge's ruling rested primarily upon the view that INA § 242(g), enacted by IIRIRA and codified at 8 U.S.C. § 1252(g), had repealed 28 U.S.C. § 2241. *Id.* at 11a-12a. On May 10, 1999, Mr. Obajuluwa filed Objections to the Magistrate Judge's Findings and Recommendations. *See* R. 156-87. On May 24, 1999, United States District Judge Jorge A. Solis adopted the Magistrate Judge's Findings and Recommendations and dismissed the Petition "for lack of jurisdiction." App. 7a. The district court did not reach the merits of the constitutional and statutory claims raised in Mr. Obajuluwa's Petition. *Id.*

B. Proceedings In The Court Of Appeals

On July 19, 1999, Mr. Obajuluwa filed his Notice of Appeal. R. 204. In his appeal, Mr. Obajuluwa argued that the district court's dismissal of his Petition was error for several reasons:

First, Mr. Obajuluwa argued that, in light of this Court's ruling in *Reno v. American-Arab Anti Discrimination Com-*

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[2] Venue was proper in Texas, because of Mr. Obajuluwa's continued detention by the INS in the Northern District.

mittee, 525 U.S. 471, 482 (1999) ("*AADC*"), 8 U.S.C. § 1252(g) could not be construed as repealing habeas corpus jurisdiction under 28 U.S.C. § 2241.

Second, Mr. Obajuluwa argued that AEDPA § 401(e) could not be construed as eliminating habeas corpus jurisdiction under 28 U.S.C. § 2241.

Third, Mr. Obajuluwa argued that neither 8 U.S.C. § 1252(a)(2)(C) nor 8 U.S.C. § 1252(b)(9) could properly be construed as repealing habeas corpus jurisdiction under 28 U.S.C. § 2241.

Fourth, Mr. Obajuluwa argued that, to the extent that any provisions of AEDPA or IIRIRA could be read to eliminate habeas corpus jurisdiction, they violate Article I, § 9, cl. 2 (the "Suspension Clause") and Article III of the United States Constitution, and the Due Process Clause of the Fifth Amendment to the United States Constitution.

Fifth, Mr. Obajuluwa argued that, to the extent the Court of Appeals determined that habeas corpus jurisdiction had been eliminated, it should apply this rule prospectively, given Mr. Obajuluwa's reliance on prior contrary holdings by the Court of Appeals interpreting virtually identical language. *See Lerma de Garcia v. INS*, 141 F.3d 215 (5th Cir. 1998) (IIRIRA § 309(c)(4)(G) eliminates petition-for-review jurisdiction, but habeas corpus jurisdiction under 28 U.S.C. § 2241 is still available); *Nguyen v. INS*, 117 F.3d 206 (5th Cir. 1997) (same); *Williams v. INS*, 114 F.3d 82 (5th Cir. 1997) (AEDPA § 440(a) prohibits aggravated felon from bringing direct petition for review, but does not preclude habeas corpus jurisdiction under 28 U.S.C. § 2241).

On July 7, 2000, the Court of Appeals affirmed the district court's dismissal of Mr. Obajuluwa's Petition for lack of subject matter jurisdiction. In its unpublished *per curiam* opinion, the Court of Appeals followed its previous published decisions in *Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000), *Garnica-Vasquez v. Reno*, 210 F.3d 558 (5th Cir. 2000), and *Finlay v. INS*, 210 F.3d 556 (5th Cir. 2000), and ruled that "the IIRIRA permanent rules removed federal ha-

beas jurisdiction under 28 U.S.C. § 2241 over challenges to orders removing certain criminal aliens under 8 U.S.C. § 1252(a)(2)(C)." App. 3a-4a. The Court of Appeals further ruled that "any remaining habeas jurisdiction under the Constitution did not encompass the claims petitioner raised, including the claim that he had a right to be considered for discretionary relief from removal, which his status as an aggravated felon precluded." *Id.* at 4a (citing *Max-George*, 205 F.3d at 202).

The Court of Appeals further ruled that "[a]n alien convicted of an aggravated felony and subject to a final order of removal on that basis must file a petition for review in the court of appeals." *Id.* (citing *Max-George*, 205 F.3d at 202). As stated by the Court of Appeals, "[i]f a petition for review is filed, then the court of appeals must determine whether '(1) the specific conditions that bar jurisdiction in the court of appeals exist, (2) the conditions barring jurisdiction are constitutionally applied to the petitioner, and (3) the level of judicial review remaining is constitutionally adequate . . . .'" *Id.* (quoting *Max-George*, 205 F.3d at 202). The Court of Appeals further stated that "unless 'a petitioner proves that his or her claims are within the writ constitutionally protected (a situation which, as the Seventh Circuit has noted, is unlikely), we must summarily dismiss for lack of jurisdiction.'" *Id.* (quoting *Garnica-Vasquez*, 210 F.3d at 560).

The Court of Appeals then ruled that "[t]he record in this case discloses no basis for finding that Obajuluwa raised claims within the constitutional writ, which is narrower than under section 2241." *Id.* at 4a. The Court of Appeals stated that "[t]his court has held that a retroactively applied criminal categorization in the immigration context is not a due process violation, *see Max-George*, 205 F.3d at 200, and that denial of consideration for discretionary relief from removal is not a constitutional violation, *see Finlay*, 210 F.3d at 557." *Id.* at 4a-5a.

Thus, the Court of Appeals ruled that the district court had "correctly dismissed Obajuluwa's habeas petition for lack of jurisdiction." *Id.* at 5a.

Mr. Obajuluwa did not seek rehearing of the *per curiam* ruling of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The Court should grant *certiorari* for three reasons:

First, the determination by the Court of Appeals that 8 U.S.C. §§ 1252(a)(2)(C) and 1252(b)(9), enacted by IIRIRA, repealed habeas corpus jurisdiction, squarely conflicts with this Court's clear holdings in *Felker v. Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105-06 (1868), that habeas corpus jurisdiction cannot be repealed "by implication." *Felker*, 518 U.S. at 660-61. A repeal of habeas corpus jurisdiction can only be effected by clear congressional command. Because neither 8 U.S.C. § 1252(a)(2)(C) nor 8 U.S.C. § 1252(b)(9) even mention habeas corpus jurisdiction under 28 U.S.C. § 2241, let alone explicitly provide for its repeal, the ruling by Court of Appeals clearly conflicts with the *Felker / Yerger* rule. This Court should grant *certiorari* to resolve this conflict and correct the erroneous determination by the Court of Appeals.

Second, the ruling by the Fifth Circuit in this case, in *Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000), and in other cases, squarely conflicts with contrary rulings in the First, Second, Third, and Ninth Circuits. Contrary to the Fifth Circuit, the First, Second, Third, and Ninth Circuits uniformly follow the *Felker / Yerger* rule and hold that the permanent provisions of IIRIRA did *not* repeal habeas corpus jurisdiction under 28 U.S.C. § 2241. *See Mahadeo v. Reno*, __ F.3d __, 2000 WL 1257273 (1st Cir. Sept. 11, 2000) (following *Felker* and *Yerger* to hold that IIRIRA did not repeal habeas jurisdiction under 28 U.S.C. § 2241); *Calcano-Martinez v. INS*, __ F.3d __, 2000 WL 1336611 (2d Cir. Sept. 1, 2000) (same); *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000) (same); *Liang v. INS*, 206 F.3d 308 (3d Cir. 2000) (same); *contra Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999) (ruling that IIRIRA did repeal habeas corpus jurisdiction under 28 U.S.C. § 2241, in accord with the Fifth Circuit's ruling in this case and in *Max-George*), *cert. denied*,

120 S. Ct. 1529 (2000). This Court should grant *certiorari* to resolve this clear conflict among the lower courts.

Third, this Court should grant *certiorari* because this petition presents constitutional and statutory questions of exceptional importance to the Nation's enforcement of its immigration laws. The question of whether federal courts have habeas corpus jurisdiction to consider claims by aliens seeking to challenge removal orders is recurring, and the continuing lower court conflict over the issue has led to dramatically different results in identical cases. The Court should grant *certiorari* to put to rest the uncertainty pervading this important area of the law.

A. The Decision Below Directly Conflicts With This Court's Clear Rule That Repeals Of Habeas Corpus Jurisdiction Must Be Explicit, And Cannot Be By Implication

1. Section 2241 of Title 28 of the United States Code, which provides that federal courts have jurisdiction to grant writs of habeas corpus to persons "in custody in violation of the Constitution or laws or treaties of the United States," traces its lineage to § 14 of the Judiciary Act of 1789 (1 Stat. 73, 81-82). *See Felker*, 518 U.S. at 661 (describing this provision of the Judiciary Act as the direct ancestor of the current 28 U.S.C. § 2241). As far back as its decision in *United States v. Jung Ah Lung*, 124 U.S. 621 (1888), this Court has recognized that, under § 2241, federal district courts have habeas corpus jurisdiction to consider the legality of deportation or exclusion orders entered against aliens. As stated by the Court in *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892), "[a]n alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful."

In *Ex parte Yerger*, this Court ruled emphatically that repeals of habeas corpus jurisdiction "by implication are not favored." *Yerger*, 75 U.S. at 105. Thus, the Court ruled that

Congress's 1867 repeal of the Court's appellate jurisdiction over habeas corpus petitions did not operate to repeal the Supreme Court's general habeas corpus jurisdiction under the 1789 Judiciary Act. As stated by the Court:

> [T]here are no repealing words in the [A]ct of 1867. If it repealed the [A]ct of 1789, it did so by implication. . . . Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former [A]ct can stand together with the new [A]ct.

Yerger, 75 U.S. at 105.

In the 1996 *Felker* decision, the Court interpreted AEDPA § 106(b) (codified at 28 U.S.C. § 2244(b)(3)(E)) in light of the *Yerger* rule. This provision bars state prison inmates from filing "second or successive" habeas corpus petitions without first obtaining permission from a three-judge panel of the relevant court of appeals. The statute provides that a panel's grant or denial of authorization to file "shall not be appealable and shall not be the subject of a petition for . . . writ of *certiorari*." 28 U.S.C. § 2244(b)(3)(E). Noting that "[n]o provision of Title I [of AEDPA] mentions our authority to entertain original habeas petitions," the Court ruled that because repeals of habeas corpus jurisdiction by implication are not favored, AEDPA § 106(b) did not preclude the Court from exercising its original habeas jurisdiction under 28 U.S.C. § 2241. *Felker*, 518 U.S. at 660.

Read together, *Felker* and *Yerger* "establish the propositions that courts should not lightly presume that a congressional enactment containing general language effects a repeal of a jurisdictional statute, and, consequently, that only a *plain statement of congressional intent to remove a particular statutory grant of jurisdiction will suffice*." *Sandoval v. Reno*, 166 F.3d 225, 232 (3d Cir. 1999) (emphasis added). *See also Calcano-Martinez*, 2000 WL 1336611, at *10 (declining to "strain to infer that Congress radically repealed the federal courts' habeas jurisdiction to review final orders of removal," holding that under *Felker* and *Yerger*, "a court

cannot presume that a congressional enactment effects a repeal of a jurisdictional statute when it does not explicitly mention the jurisdictional statute or the general type of jurisdiction by name."); *Mahadeo*, 2000 WL 1257273, at *5 ("'any repeal of the federal courts' historic habeas jurisdiction . . . must be explicit and make express reference specifically to the statute granting jurisdiction'") (quoting *Goncalves v. Reno*, 144 F.3d 110, 120 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999)).

2. No provision of IIRIRA contains an "express statement of congressional intent" to repeal habeas corpus jurisdiction under 28 U.S.C. § 2241. *Sandoval*, 166 F.3d at 236-37. Indeed, the provisions relied upon by the court below – 8 U.S.C. § 1252(a)(2)(C) and 8 U.S.C. § 1252(b)(9) – do not even *mention* habeas corpus jurisdiction at all, let alone habeas jurisdiction under § 2241.

Thus, under the *Felker* / *Yerger* rule against repeals of habeas corpus jurisdiction "by implication," IIRIRA cannot be construed to repeal habeas corpus jurisdiction under 28 U.S.C. § 2241.

3. The language in 8 U.S.C. § 1252(a)(2)(C) providing that "no court shall have jurisdiction to review any final order of removal," and in § 1252(b)(9) providing that "[j]udicial review . . . shall be available only in judicial review of a final order under this section," does not require a contrary conclusion.

As numerous courts have held, the term "judicial review," as it is used in such jurisdiction-limiting statutes as 8 U.S.C. §§ 1252(a)(2)(C) and 1252(b)(9), does *not* include habeas corpus jurisdiction under 28 U.S.C. § 2241. As the Third Circuit in *Sandoval* has emphasized:

> [I]n the immigration context, the [Supreme] Court has historically drawn a sharp distinction between "judicial review" – meaning APA review – and the court's power to entertain petitions for writs of habeas corpus.

Sandoval, 166 F.3d at 235 (citing *Heikkila v. Barber*, 345 U.S. 229, 235-36 (1953)); *see also Flores-Miramontes*, 212 F.3d at 1140 (same).

Based on this fundamental distinction, and in accord with the *Felker / Yerger* rule against repeals of habeas jurisdiction by implication, this Court has repeatedly found jurisdiction to consider habeas corpus petitions challenging deportation orders, despite statutory provisions (such as 8 U.S.C. § 1252(a)(2)(C)) purportedly barring all "judicial review." Indeed, the initial recognition of such habeas corpus jurisdiction by the Court, in *Jung Ah Lung*, 124 U.S. 621, stemmed from an attempt by the government to argue that this power had been eliminated by an Act of Congress – the Chinese Exclusion Act. Rejecting this argument, the district court emphasized that "[s]uch an abrogation of the writ of *habeas corpus*, which has always been considered among English-speaking peoples the most sacred muniment of personal freedom, must be unmistakably declared by congress before any court could venture to withhold its benefits from any human being[.]" *In re Jung Ah Lung*, 25 F. 141, 142-43 (D. Cal. 1885). This ruling was affirmed by the Court in *Jung Ah Lung*, 124 U.S. at 628-30; *see also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1004-06 (1998) (discussing the *Jung Ah Lung* decision).

From that point forward, federal courts have consistently utilized the writ of habeas corpus to review the legality of deportation or exclusion orders, despite express congressional efforts to restrict judicial review. Indeed, courts did this, despite a provision in the 1891 Immigration Act providing that "[a]ll decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, *shall be final* unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury" (Immigration Act of 1891, ch. 551, § 8 (26 Stat. 1084, 1085) (emphasis added)) and a similar provision in the 1917 Immigration Act (*see* § 19, 29 Stat. 874). Indeed, in *Nishimura Ekiu*, the first

case to interpret the "finality" provision of the 1891 Act, the Court declared that "[a]n alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful." *Nishimura Ekiu*, 142 U.S. at 660. *Accord Yamataya v. Fisher*, 189 U.S. 86 (1903) (similarly considering habeas corpus petition, despite 1891 Act's "finality" provision); *see generally Henderson v. INS*, 157 F.3d 106, 112-17 (2d Cir. 1998) (discussing history of habeas corpus jurisdiction, despite statutory provisions restricting judicial review), *cert. denied*, 526 U.S. 1004 (1999).

In *Heikkila v. Barber*, 345 U.S. 229 (1953), the Court explicitly rejected the view that "habeas corpus itself represented judicial review." *Id.* at 235. In that case, the Court held that the enactment of the Administrative Procedure Act of 1946 did not supercede federal courts' habeas corpus jurisdiction to consider challenges to deportation orders. The Court further emphasized that although the 1917 Act was a "statute precluding judicial review," an alien could still maintain a habeas corpus petition. *Id.* In so doing, the Court observed that despite Congress's effort to make deportation decisions "nonreviewable to the fullest extent possible under the Constitution," habeas corpus jurisdiction still existed to consider challenges to such orders. *Id.* at 234; *see also Sandoval*, 166 F.3d at 235 (noting that in *Heikkila*, the Court has "expressly rejected the conclusions of three courts of appeals that had 'taken the position that habeas corpus itself represented judicial review.'") (citation omitted).

Under these authorities, and consistent with the *Felker / Yerger* clear statement rule, it is clear that the restriction on "judicial review" contained in 8 U.S.C. §§ 1252(a)(2)(C) and (b)(9) does *not* preclude habeas corpus jurisdiction under § 2241. Thus, the contrary determination by the Court of Appeals in this case and in *Max-George* squarely conflicts with the well-established law of this Court.

4. For similar reasons, the phrase "notwithstanding any other provision of law," as used in 8 U.S.C. § 1252(a)(2)(C),

also does not mandate a contrary conclusion. This additional phrase does not provide 8 U.S.C. §§ 1252(a)(2)(C) or 1259(b)(9) any additional scope, such that the statute would satisfy the *Felker / Yerger* rule against repeals of habeas jurisdiction by implication. Moreover, the phrase does not negate this Court's traditional distinction between "judicial review" and habeas corpus, discussed above. The statute is, thus, indistinguishable from the statutes at issue in *Heikkila*, *Nishimura Ekiu*, and other cases in which the Court ruled that despite statutory provisions explicitly precluding "judicial review," habeas corpus jurisdiction still existed.

Thus, the determination by the Court of Appeals flatly contradicts this Court's holdings in *Felker* and *Yerger*, as well as the past century of precedents concluding that limitations on "judicial review" do not constitute implied repeals of habeas corpus jurisdiction. For this reason, the Court should grant *certiorari*.

B. The Decision Of The Court Of Appeals Squarely Conflicts With Contrary Decisions Of The First, Second, Third, And Ninth Circuits

The decision below conflicts not only with this Court's precedents, but also with decisions of the First, Second, Third, and Ninth Circuits – all uniformly holding that IIRIRA did not repeal habeas corpus jurisdiction under 28 U.S.C. § 2241. For this additional reason, the Court should grant *certiorari* to resolve this split in lower court authority.

Indeed, the ruling of the Court of Appeals reveals a profound circuit split on this issue. For example, in *Mahadeo v. Reno*, __ F.3d __, No. 99-1687, 2000 WL 1257273 (1st Cir. Sept. 11, 2000), the First Circuit followed *Felker* and *Yerger* to hold unequivocally that because "IIRIRA's permanent rules – like the transitional rules before them – lack a clear statement of intent to repeal § 2241 jurisdiction," IIRIRA could not be construed to repeal such jurisdiction. *Id.*, 2000 WL 1257273, at *9; *see also Sousa v. INS*, __ F.3d __, No. 99-2049, 2000 WL 1358469, at *6 (1st Cir. Sept. 22, 2000) (following *Mahadeo*, dismissing for lack of jurisdiction the

alien's petition for review, and holding that the alien could seek "habeas relief in the district court" under 28 U.S.C. § 2241).

In *Calcano-Martinez v. INS*, __ F.3d __, Nos. 98-4033, 98-4214, 98-4246, 2000 WL 1336611 (2d Cir. Sept. 1, 2000), the Second Circuit similarly followed *Felker* and *Yerger* to hold that IIRIRA had not repealed habeas corpus jurisdiction under 28 U.S.C. § 2241. As stated by the court, "there is . . . nothing in IIRIRA's permanent provisions that constitutes a sufficiently clear statement of congressional intent to repeal the habeas jurisdiction granted Article III courts by 28 U.S.C. § 2241." *Id.*, 2000 WL 1336611, at *11. The Second Circuit also followed *Heikkila* and other authorities and further stated that "[w]e will not infer that Congress meant to repeal habeas corpus review under 28 U.S.C. § 2241 when it mentioned only judicial review, a distinct and separate concept from habeas." *Id.* In reaching these conclusions, the Second Circuit expressly rejected the contrary rulings of the Fifth Circuit (in *Max-George*) and the Eleventh Circuit (in *Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1529 (2000)). *See id.*, 2000 WL 1336611, *9-10.

In *Liang v. INS*, 206 F.3d 308 (3d Cir. 2000), the Third Circuit also followed *Felker* and *Yerger* to hold that IIRIRA did not repeal habeas corpus jurisdiction under 28 U.S.C. § 2241. In so doing, the court also explicitly rejected the view of the Fifth and Eleventh Circuits. As stated by the court:

> The holdings of both *Richardson* cases and *Max-George* that Congress need not mention habeas or § 2241 to repeal the district courts' habeas jurisdiction are at odds not only with our reasoning in *Sandoval* but with the reasoning of the other courts of appeals that have read the Supreme Court's precedent in *Yerger* and *Felker* to require explicit statutory reference to habeas or § 2241 to effect congressional repeal of habeas jurisdiction.

Liang, 206 F.3d at 320.

Finally, in *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000), the Ninth Circuit similarly ruled that IIRIRA had not repealed jurisdiction under 28 U.S.C. § 2241. *Id.* at 1136.

These decisions of the First, Second, Third, and Ninth Circuits all squarely conflict with those of the Fifth Circuit (not only the decision below, but in *Max-George*) and the Eleventh Circuit (in *Richardson*). Moreover, these cases are indistinguishable from each other. All of these cases were presented with the same question for review – whether an alien could seek habeas corpus relief under 28 U.S.C. § 2241, despite IIRIRA's permanent provisions. The First, Second, Third, and Ninth Circuits have said yes, and the Fifth and Eleventh Circuits have said no. This is a clear conflict in authority calling out for resolution.

For this additional reason, the Court should grant *certiorari*.

C. Resolution Of The Questions Presented Is Of Vital Importance To The Interpretation And Enforcement Of The Immigration Laws

It is beyond peradventure that resolving the question of whether IIRIRA repealed habeas corpus jurisdiction under 28 U.S.C. § 2241 is of vital importance to the fair and orderly application of our Nation's immigration laws. Indeed, the current situation – in which some circuits have determined that jurisdiction under § 2241 exists and some have not – is clearly untenable, given that the degree to which the legality of a removal order can be challenged is entirely dependent upon the physical location of the alien. *Certiorari* is clearly warranted to resolve this important conflict.

Moreover, the question of whether IIRIRA repealed § 2241 raises serious and complex questions of both statutory interpretation and constitutional law that should be resolved as quickly as possible. Indeed, if the Court determines that IIRIRA repealed § 2241, it must face the question of whether

such a repeal – essentially eliminating the ability of aliens convicted of certain crimes to challenge the legality of their removal orders in Article III courts – violates the Constitution.

And, given that under 8 U.S.C. § 1252(a)(2)(C), aliens convicted of aggravated felonies are precluded from bringing a petition for review in the court of appeals, *see Calcano-Martinez*, 2000 WL 1336611, *14 (holding that § 1252(a)(2)(C) eliminates petition-for-review jurisdiction for aliens convicted of certain crimes), such a repeal *would* be unconstitutional.

First, such a repeal would violate Article I, § 9, cl. 2 of the Constitution (the "Suspension Clause"). At a minimum, this Clause requires that Congress provide a means of judicial scrutiny that is "neither inadequate nor ineffective to test the legality of a person's detention . . . ." *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (citing *United States v. Hayman*, 342 U.S. 205, 223 (1952)). Since *Jung Ah Lung*, this Court has extended that constitutional right to require judicial scrutiny of deportation orders. *Jung Ah Lung*, 124 U.S. at 628-30; *see also Heikkila*, 345 U.S. at 234 (interpreting the "finality" clauses of the 1891 and 1917 Immigration Acts as making deportation decisions "nonreviewable to the fullest extent possible under the Constitution"). Given the clear bar on the review of removal orders against aggravated felons under 8 U.S.C. § 1252(a)(2)(C), the Suspension Clause is clearly violated if IIRIRA is construed to repeal habeas corpus jurisdiction under 28 U.S.C. § 2241.

Second, if IIRIRA were construed to repeal habeas corpus jurisdiction under 28 U.S.C. § 2241, this would violate the Fifth Amendment's guarantee of due process. It is well established that, given the consequences of deportation, *see Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation and the resulting separation from home and family can deprive a person of "all that makes life worth living"), lawful permanent residents have constitutional due process rights in deportation proceedings. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-97 (1953). These due process guarantees

would, of course, be meaningless if judicial scrutiny of the legality of removal orders were deemed entirely eliminated by IIRIRA. *See Battaglia v. General Motors*, 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948) ("while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law"). Thus, any repeal of habeas corpus jurisdiction, combined with the elimination of petition-for-review jurisdiction, would violate fundamental due process.

Finally, repeal of 28 U.S.C. § 2241 would violate the Separation of Powers principles embodied in Article III of the Constitution, for it would eliminate the "essential function" of the judiciary (*United States v. Nixon*, 418 U.S. 683, 707 (1974)) – *i.e.*, to provide "independent and impartial adjudication . . . of matters within the judicial power of the United States[,]" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986), and to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

In ruling that IIRIRA did not repeal 28 U.S.C. § 2241, the First, Second, Third, and Ninth Circuits expressly avoided these serious and complex constitutional questions. *See, e.g., Calcano-Martinez*, 2000 WL 1336611, *10 ("our preservation of habeas jurisdiction under the permanent rules avoids the novel and profound constitutional questions that would arise were we to find that IIRIRA eliminates habeas jurisdiction over final immigration decisions"); *Liang*, 206 F.3d at 321 (ruling that IIRIRA did not repeal § 2241 jurisdiction "obviates the serious constitutional problems that would arise were we to . . . read the permanent rules to strip the district courts of habeas jurisdiction"). This avoidance of a constitutional confrontation is consistent with the basic principle that courts should construe statutes to avoid constitutional confrontations or "doubt." Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 561 (1990). *Accord Spector Motor Serv., Inc. v. McLaughlin*,

323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

The court below's attempt to avoid the unconstitutional implications of its ruling – by interpreting 8 U.S.C. § 1252(a)(2)(C) as permitting limited petitions for review by aliens convicted of aggravated felonies – is plainly unpersuasive and inadequate, and utterly conflicts with the plain language of the statute. Indeed 8 U.S.C. § 1252(a)(2)(C) plainly states that "*no* court shall have jurisdiction to review *any* final order" (emphasis added). For these reasons, the First, Second, Third, Fourth, and Ninth Circuits have all uniformly rejected the Fifth Circuit's counter-textual reading of § 1252(a)(2)(C). *See Sousa*, 2000 WL 1358469, *6 (INA section 242(a)(2)(C) precludes our review of any final order of removal by an alien removable because he is an aggravated felon"); *Calcano-Martinez*, 2000 WL 1336611, *13 (same); *Flores-Miramontes*, 212 F.3d at 1136 (same); *Liang*, 206 F.3d at 322 (same); *Lewis v. INS*, 194 F.3d 539, 541 (4th Cir. 1999) (same).

Thus, the serious constitutional consequences of the lower court's ruling are inescapable, and require attention by this Court. For this additional reason, *certiorari* is warranted in order to resolve and clarify this important area of the law.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

October 5, 2000

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-10831

EMANUEL OBAJULUWA,

Petitioner – Appellant,

VS.

JANET RENO, Attorney General, United States of America; IMMIGRATION AND NATURALIZATION SERVICE; ARTHUR E. STRAPP, District Director,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3: 99-CV-285)

July 7, 2000

Before WIENER and STEWART, Circuit Judges; and ROSENTHAL, District Judge.*

PER CURIAM:**

Emanuel Obajuluwa appeals this district court's dismissal of his habeas corpus petition challenging an Immigration and

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*District Judge of the Southern District of Texas, sitting by designation.

**Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Naturalization Service final order removing him from this country. The district court held that it lacked jurisdiction over Obajuluwa's petition. Applying this circuit's recent holding in *Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000), we affirm.

I. BACKGROUND

Obajuluwa is a Nigerian citizen who entered the United States in December 1981. He became a lawful permanent resident on December 27, 1990. On August 18, 1994, Obajuluwa was convicted of credit card fraud and conspiracy to commit wire fraud, money laundering, and credit card fraud. The district court sentenced Obajuluwa to two concurrent terms of 56 months of imprisonment.

On April 22, 1997, the Immigration and Naturalization Service ("INS") initiated removal proceedings against Obajuluwa under 8 U.S.C. § 1227(a)(2)(A)(iii) (West Supp. 1998), based on his felony conviction. An immigration judge ordered Obajuluwa removed to Nigeria on March 6, 1998. Obajuluwa appealed to the Board of Immigration Appeals ("BIA"); the BIA dismissed Obajuluwa's appeal on September 28, 1998. The removal order became final on November 25, 1998, the date the BIA denied Obajuluwa's motion to reconsider.

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which limited federal court jurisdiction over certain removal orders, an alien has thirty days to appeal an order of removal and must pursue that appeal in the court of appeals, not the district court. Obajuluwa did not file a petition for review in the court of appeals within the thirty days permitted. Instead, Obajuluwa filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Texas. In that petition, Obajuluwa asserted that the retroactive application of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and IIRIRA to eliminate eligibility for discretionary relief under section 212(c) of the Immigration and Naturalization Act denied him due process and violated the

Ex Post Facto Clause. He also alleged that the INS illegally delayed beginning removal proceedings against him until 1997, in violation of 8 U.S.C. § 1229(d).

The district court, adopting the magistrate judge's recommendation, dismissed Obajuluwa's habeas petition for lack of jurisdiction. On this appeal, Obajuluwa first claims that the permanent provisions of IIRIRA, as codified at 8 U.S.C. § 1252(a)(2)(C), did not strip the district court of habeas jurisdiction to review the order to remove him as an alien convicted of an aggravated felony. He also argues that if section 1252(a)(2)(C) does eliminate habeas jurisdiction in the district court, this provision should be applied prospectively; that his habeas petition should be treated as a petition for review under section 1252(b); or that this court should allow him to submit an out-of-time petition for review.

II. ANALYSIS

This case is controlled by this circuit's recent decisions in *Max-George v. Reno*, 205 F.3d 194 (5th Cir. Feb. 24, 2000); *Garnica-Vasguez v. Reno*, 210 F.3d 558 (5th Cir. May 4, 2000); and *Finlay v. INS*, 210 F.3d 556 (5th Cir. May 4, 2000). In those cases, as here, a resident alien convicted of an offense characterized as an aggravated felony raised a habeas challenge to an INS final removal order. The underlying claims in those cases bear substantial similarity to the claims Obajuluwa raises here: the petitioner in *Max-George* "claimed that the 'retroactive' application of the 'aggravated felon' classification deprived him of due process[,]" *Max-George*, 205 F.3d at 196, and the petitioner in *Finlay* claimed that "Ex Post Facto law denied him the chance to obtain discretionary relief from removal." *Id.*, 210 F.3d at 557. Obajuluwa makes only one argument not addressed in these earlier cases: his claim that the INS unreasonably delayed beginning deportation proceedings against him, in violation of 8 U.S.C. §1229(d).

In *Max-George*, the court held that the IIRIRA permanent rules removed federal habeas jurisdiction under 28 U.S.C. § 2241 over challenges to orders removing certain criminal

aliens under 8 U.S.C § 1252(a)(2)(C). The court held that any remaining habeas jurisdiction under the Constitution did not encompass the claims petitioner raised, including the claim that he had a right to be considered for discretionary relief from removal, which his status as an aggravated felon precluded. *Max-George*, 205 F.3d at 202.

An alien convicted of an aggravated felony and subject to a final order of removal on that basis must file a petition for review in the court of appeals. *Max-George*, 205 F.3d at 202. If a petition for review is filed, then the court of appeals must determine whether "(1) the specific conditions that bar jurisdiction in the court of appeals exist, (2) the conditions barring jurisdiction are constitutionally applied to the petitioner, and (3) the level of judicial review remaining is constitutionally adequate . . . ." *Id.* This circuit has held that unless "'a petitioner proves that his or her claims are within the writ constitutionally protected (a situation which, as the Seventh Circuit has noted, is unlikely), we must summarily dismiss for lack of jurisdiction.'" *Garnica-Vasguez*, 210 F.3d at 560 (quoting *Max-George*, 205 F.3d at 202); *see also Finlay*, 210 F.3d at 558 (same). The constitutionally protected writ of habeas corpus is not suspended unless a petition for review would be "inadequate or ineffective to test the legality of detention." *Molo v. Johnson*, 207 F.3d 773, 775 (5th Cir. 2000) (quoting *Miller v. Marr*, 141 F.3d 976, 977 (10th Cir. 1998)) (internal quotation marks omitted).

Where, as here, the petitioner did not file a petition for review in the court of appeals, but instead sought habeas relief in district court, this circuit has held that the district court lacked habeas jurisdiction. *See Garnica-Vasques*, 210 F.3d at 560; *Finlay*, 210 F.3d at 558. The record in this case discloses no basis for finding that Obajuluwa raised claims within the constitutional writ, which is narrower than under section 2241. This court has held that a retroactively applied criminal categorization in the immigration context is not a due process violation, *see Max-George*, 205 F.3d 200, and that denial of consideration for discretionary relief from removal is not a constitutional violation, *see Finlay*, 210 F.3d

at 557. Obajuluwa's claim of delay based on a violation of 8 U.S.C. § 1229(d) does not fall within the ambit of the constitutionally protected writ. The district court correctly dismissed Obajuluwa's habeas petition for lack of jurisdiction.

Obajuluwa also asks this court to apply the denial of habeas prospectively, or, in the alternative, to allow him to pursue an out-of-time petition for review in this court. He argues that when the BIA issued the final removal order, the jurisdictional questions were so unclear that he should be "given the benefit of the jurisdictional doubt . . . ." (Appellant's Brief, p.42). The law is clear that "'[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only.'" *United States v. Holmberg*, 19 F.3d 1062, 1065 (5th Cir. 1994) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981)), *abrogated on other grounds, Henderson v. United States*, 517 U.S. 654 (1996). Given the statute, and this court's precedent, the district court's dismissal of Obajuluwa's habeas petition for lack of jurisdiction is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EMANUEL OBAJULUWA Petitioner,	§ § §	
VS.	§	NO. 3-99-CV-0285-P
JANET RENO, ET AL. Respondents.	§ § §	

[May 21, 1999]

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED and DECREED that:

1. The petition for writ of habeas corpus is dismissed for lack of jurisdiction.

2. The Clerk shall transmit a true copy of this Order and the Order adopting the Findings and Recommendation of the United States Magistrate Judge to all parties.

SIGNED this 21st day of May, 1999.

/s/

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EMANUEL OBAJULUWA Petitioner,	§ § §	
VS.	§	NO. 3-99-CV-0285-P
JANET RENO, ET AL. Respondents.	§ § §	

[May 21, 1999]

ORDER

After making an independent review of the pleadings, files and records in this case, and the Findings and Recommendation of the United States Magistrate Judge, I am of the opinion that the Findings and Recommendation of the Magistrate Judge are correct and they are adopted as the Findings of the Court.

SIGNED this 21st day of May, 1999.

/s/
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EMANUEL OBAJULUWA Petitioner,	§ § §	
VS.	§	NO. 3-99-CV-0285-P
JANET RENO, ET AL. Respondents.	§ § §	

[April 27, 1999]

FINDINGS AND RECOMMENDATIONS OF THE
UNITED STATES MAGISTRATE JUDGE

This case has been referred to the United States magistrate judge pursuant to 28 U.S.C. § 636(b) and a standing order of reference from the district court. The findings and recommendation of the magistrate judge are as follows:

I.

This is a habeas case brought under 28 U.S.C. § 2241. Petitioner Emanuel Obajuluwa is in federal custody pursuant to an order of removal. Respondents are Attorney General Janet Reno and INS District Director Arthur E. Strapp.

Petitioner entered the United Stats as an non-immigrant visitor on December 16, 1981 for a period not to exceed six months. He became a lawful permanent resident on December 27, 1990. Thereafter, petitioner was convicted of money laundering, credit card fraud, conspiracy to commit wire fraud, and forgery. Punishment was assessed at 56 months confinement. An immigration judge ordered petitioner re-

moved to Nigeria based on these convictions.[1] Petitioner appealed this decision to the Board of Immigration Appeals. The appeal was dismissed. Petitioner then filed this action in federal court.

II.

Petitioner challenges his detention and removal on three grounds. He contends that: (1) the three-year delay in bringing removal proceedings is unreasonable and contrary to federal law; (2) he was denied due process; and (3) the retroactive application of the new immigration law violates the *ex post facto* clause of the United State Constitution.

Respondent argues that this Court lacks jurisdiction to review any immigration matter pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009. Alternatively, respondent maintains that petitioner is not entitled to habeas relief. The Court will address the jurisdictional issue first.

III.

Historically, federal judicial review of a deportation order was available either through direct appeal or habeas corpus. 8 U.S.C. §§ 1105a(a)(2) & (10) (repealed 1996). The scope of review in both types of proceedings was the same.

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[1]The Immigration and Nationality Act provides, in relevant part:

"Any alien who–

(I) is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable."

8 U.S.C. § 1227(a)(2)(i).

Marcelio v. District Director, 634 F.2d 964, 972 (5th Cir.), *cert. denied*, 101 S. Ct. 3052 (1981). The standard was whether "reasonable, substantial, and probative evidence on the record considered as a whole supports the [deportation] order." *Id.*

The IIRIRA effectively precludes judicial review of removal orders.[2] This statute provides, in relevant part:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252(g). Review is limited to a petition filed in the court of appeals following a final order of removal. *Id.* § 1252(a)(1) & (b)(9)[3] The statute specifies that decisions made at the discretion of the Attorney General, and removal based on the commission of specified criminal offenses, are not subject to judicial review. *Id.* § 1252(a)(2)(C) ("[N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a [covered] criminal offense . . ."). These provisions govern removal proceedings commenced after April 1, 1997. *Henderson v. INS*, 157 F.3d 106, 117 n.2 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1141 (1999).

Courts are split in their interpretation of the draconian restrictions created by this new legislation. *Compare Sandoval*

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[2]The IIRIRA uses the term "removal" instead of "deportation."

[3]Decisions regarding the exclusion of aliens seeking admission to the United States are still subject to habeas review under the statute. *See* 8 U.S.C. § 1252(e)(2).

v. Reno, 166 F.3d 225, 237 (3d Cir. 1999) (statute does not expressly repeal, limit, or eliminate federal habeas jurisdiction under section 2241); *Jean Baptiste v. Reno*, 144 F.3d 212, 219 (2d Cir. 1998) (same); *Goncalves v. INS*, 144 F.3d 110, 123 (1st Cir. 1998), *cert. denied*, 119 S. Ct. 1140 (1999) (same); *Mansour v. INS*, 123 F.3d 423, 426 (6th Cir. 1997) (same); *Ramallo v. Reno*, 114 F.3d 1210, 1213 (D.C. Cir. 1997), *cert. denied*, 119 S. Ct. 1139 (1999) (same), *with LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1999) (IIRIRA precludes habeas review of constitutional claims); *Richardson v. Reno*, 162 F.3d 1338, 1378 (11th Cir. 1998), *pet. for cert. filed*, 67 USLW 3561 (February 23, 1999) (same). *See also Williams v. INS*, 114 F.3d 82, 84 (5th Cir. 1997) (noting in dicta that "limited opportunity to apply for writ of habeas corpus may remain"); *Fernandez v. INS*, 113 F.3d 1151, 1154-55 & n.3 (10th Cir. 1997) (leaving open possibility of habeas review or other review for "substantial" constitutional errors). Indeed, the Supreme Court has acknowledged this split among the circuits. *Reno v. American-Arab Anti-Discrimination Committee*, 119 S. Ct. 936, 942 n.7 (1999).[4]

The most exhaustive review of this issue is provided by the Eleventh Circuit in *Richardson*. After a detailed historical discussion, the court concluded that IIRIRA repealed habeas jurisdiction over immigration decisions. *Richardson*, 162 F.3d at 1378. Since most petitioners can seek adequate and effective judicial review from the court of appeals, there is no constitutional violation. *Id.* at 1379. The Court finds this opinion persuasive. *See also Abangwu v. Reno*, ___ F. Supp.___, 1999 WL 76788 *1 (N.D. Tex. February 3, 1999)

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[4]It appears that the Supreme Court has finally agreed to tackle this jurisdictional issue by granting a petition for writ of certiorari in *Magana-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998), *cert. granted and jmt. vacated*, 119 S. Ct. 1137 (1999). Hopefully, this will resolve the split among the circuits.

(Fitzwater, J.) (holding that district court lacks jurisdiction under 28 U.S.C § 2241 to review immigration decisions). This petition should be dismissed.[5]

RECOMMENDATION

Petitioner's application for writ of habeas corpus should be dismissed for lack of jurisdiction.

DATED: April 27, 1999.

/s/
JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE

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[5]The magistrate judge acknowledges that he reached a contrary result in three prior cases. *See Tesfazghi v. Strapp*, No. 3-98-CV-1378-X (N.D. Tex. November 5, 1998); *Sayyed v. Deportation Officer Bunderson*, No. 3-98-CV-1390-D (N.D. Tex. November 5, 1998); *Aziza v. United States of America*, No. 3-98-CV-1631-H (N.D. Tex. November 5, 1998). The presiding judge in this case also ruled differently in at least one other habeas proceeding. *Philip v. District Director*, 1998 WL 241272 *2 (N.D. Tex. April 30, 1998) (Solis, J.). However, all those cases were decided before *Richardson*.